

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Common Cause Minnesota,

Complainant,
vs.

ORDER OF DISMISSAL

Minnesota Majority (Dan McGrath,
Executive Director), Minnesota Voters
Alliance (Andy Cilek, President), and
Minnesota Freedom Council (Mitch
Pearlstein, President),

Respondents.

On October 27, 2010, Common Cause Minnesota filed a Complaint with the Office of Administrative Hearings alleging Respondents Minnesota Majority, Minnesota Voters Alliance, and Minnesota Freedom Council (collectively "Respondents") violated Minn. Stat. § 211B.11 by providing political buttons to be worn at or about the polling place on election day.

The Chief Administrative Law Judge assigned the matter to the undersigned Administrative Law Judge on October 28, 2010, under Minnesota Statutes § 211B.33. A copy of the Complaint was sent by U.S. Mail to the Respondents the same day.

After reviewing the Complaint and supporting materials, the Administrative Law Judge finds that the Complaint does not set forth a *prima facie* violation of Minn. Stat. § 211B.11 against the Respondents.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

That the Complaint filed by Common Cause Minnesota against the Respondents is **DISMISSED**.

Dated: October 29, 2010

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5 this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § 14.63 to 14.69.

MEMORANDUM

The Complainant, Common Cause Minnesota, asserts that Respondents, together with the Northstar Tea Party Patriots, support a joint project called “Election Integrity Watch” that has the stated objective of “improv[ing] the overall integrity of elections in Minnesota by training thousands of voters on how to spot voter fraud and what to do about it when they do.”¹ As part of that support, the Complainant alleges the Respondents are distributing political buttons and are encouraging individuals to wear these buttons when they go to the polls on November 2, 2010, “as a visible message to others that you are watching out for voter fraud.” The buttons state: “Please ID Me” and include an image of an open, watching eye with the word “integrity” written underneath. The Complainant contends that by providing the political buttons to be worn at the polling place on election day, the Respondents have violated Minn. Stat. § 211B.11.

Minn. Stat. § 211B.11, subd. 1 provides, in relevant part as follows:

Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.² For purposes of a *prima facie* determination, the tribunal must accept the facts

¹ Complaint Ex. A.

² *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

alleged as true and the allegations do not need independent substantiation.³ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁴

Minnesota Statutes § 211B.11 is entitled “Election Day Prohibitions” and is directed at election-day campaigning. It prohibits persons from displaying campaign material, posting signs, or in any manner trying to induce or persuade voters within a polling place or within 100 feet of a building in which a polling place is situated to vote for or against a candidate or ballot question on election day.

Polling place “campaign-free” zones implicate three central concerns in First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of speech.⁵ A restriction of any of those forms of speech requires strict scrutiny of the constitutionality of that restriction. That means that the restriction has to serve a compelling state interest; has to be narrowly tailored to serve that interest; and has to be the least restrictive means of achieving that interest.⁶ Courts have found that states have a compelling interest in maintaining the integrity of the voting place and preventing voter intimidation and election fraud, and have concluded, for example, that 100 foot campaign-free boundaries are narrowly tailored to achieve that interest even though they restrict speech in “quintessential public forums,” such as sidewalks and streets.⁷

Although Section 211B.11 states that a person may not *provide* a political badge or political button *to be worn* at or about the polling place on election day, the statute is directed at conduct on election day. A violation of the statute occurs only when and if a person wears a political badge or button at or near the polling place on election day. Only then may the person who provided the political button to be worn at the polling place on election day be found to have violated the statute. To hold, as Complainant argues, that a person violates the statute by providing political buttons to others *in anticipation* that they will be worn on election day, amounts to a prior restraint on future conduct and expression.⁸

The Complainant has alleged only that Respondents have provided political buttons to be worn at or near the polling place on election day, not that a violation has occurred at a polling place on the day of a primary or election. The

³ Id.

⁴ Id.

⁵ *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

⁶ *Burson*, 504 U.S. at 198.

⁷ *Burson*, 504 U.S. at 210.

⁸ Any prior restraint of speech is reviewed bearing a heavy presumption against its constitutional validity. *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 435 (Minn. App. 1985) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639 (1963)).

Administrative Law Judge concludes, therefore, that the Complainant has failed to put forward sufficient facts to support a *prima facie* violation of Minn. Stat. § 211B.11 by the Respondents and the Complaint must be dismissed.

It is also questionable, based on this record, whether the buttons at issue are “political buttons.” The statute prohibits persons from trying to induce or persuade voters within or near a polling place to vote for or against a candidate or ballot question. Although the terms “political buttons” and “political badges” are not defined in the statute, “political purposes” is defined as “an act intended or done to influence, directly or indirectly, voting at a primary or other election.”⁹ The buttons at issue state only “please ID me” with the image of an open eye. The message is apparently in support of requiring photo identification at state and local elections. Because that specific issue is not on any ballots, it is debatable whether the buttons can be interpreted as persuading voters to vote for or against a candidate or ballot question. The buttons may be interpreted simply as advocating specific voting procedures.

The Complaint is dismissed because it fails to allege a *prima facie* violation of Minn. Stat. § 211B.11 by Respondents.

R.C.L.

⁹ Minn. Stat. § 211B.01, subd. 6.